

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RALPH STEGALL,

Defendant-Appellant.

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UNPUBLISHED

February 4, 2010

No. 288703

Wayne Circuit Court

LC No. 08-008387-FC

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of six counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1), and a count of kidnapping, MCL 750.349. The trial court sentenced defendant to concurrent terms of 29 to 50 years' imprisonment for all his convictions. Defendant now appeals as of right. We affirm defendant's convictions, vacate four of the six CSC I sentences, and remand for correction of his judgment of sentence consistent with this opinion. We have decided this appeal without oral argument pursuant to MCR 7.214(E).

Defendant's convictions stem from his protracted assault of the victim. Defendant kidnapped the victim at gunpoint and drove her to a house. With the assistance of a woman present in the home, defendant proceeded to sexually assault the victim for approximately 4-1/2 hours. Defendant eventually instructed the victim to clean herself in the bathroom; the victim pretended to do so and put on her clothes. Although defendant offered to drop the victim off somewhere, she fled when he went to the driver's side door of his truck.

Defendant first contends on appeal that the trial court improperly allowed the prosecutor to present police officer opinion testimony regarding the officer's disbelief of defendant's September 2007 report that he had been the victim of a robbery. Detroit Police Sergeant Eric Decker testified that on September 19, 2007, he went to a hospital in response to a shooting dispatch. At the hospital, Sergeant Decker spoke with defendant, the shooting victim, who averred that he had been the victim of an armed robbery. According to Sergeant Decker, defendant's account did not match the reports of other witnesses or Decker's observations of defendant's pickup truck, causing him to doubt the veracity of defendant's claim. When Sergeant Decker confronted defendant, he admitted that he had shot himself and advised Decker where he had taken the handgun with which the shooting had occurred.

Defendant now maintains that Sergeant Decker's testimony amounted to opinion evidence inadmissible under MRE 701, which the prosecutor improperly introduced solely to undermine defendant's credibility and his consent defense in this case. Because defendant did not raise this particular objection in the trial court, we review the admissibility of Sergeant Decker's testimony for plain error affecting defendant's substantial rights. MRE 103(a)(1); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Under MRE 701, a lay witness may testify "to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."<sup>1</sup> This Court has upheld a trial court's admission of lay opinion testimony by a police officer where it rested on that officer's perceptions and assisted the jurors in determining a fact in issue. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). Sergeant Decker's opinion was based on his own perceptions of defendant during his statement to Decker and his knowledge of the other circumstances surrounding the purported robbery. Sergeant Decker's testimony also had relevance toward establishing a disputed factual issue in this case, namely whether defendant did, in fact, have access to a handgun during the time frame in which he kidnapped the victim at gunpoint and then sexually assaulted her. The victim's recollections that defendant had accosted and kidnapped her at gunpoint formed the basis of the first two counts of the felony information. MCL 750.520b(1)(e). Given that Sergeant Decker's challenged testimony tended to prove that defendant had access to a handgun around the time of the victim's abduction and assault,<sup>2</sup> we conclude that the trial court did not plainly err in allowing the prosecutor to elicit Sergeant Decker's opinion testimony under MRE 701. *Daniel*, 207 Mich App at 57. Even assuming that the trial court plainly erred, we reject that any error affected defendant's substantial rights in light of the discrete nature of the error and the other evidence admitted at trial, specifically (1) the victim's descriptive account of the kidnapping and prolonged sexual assault she endured, (2) other acts evidence, which defendant does not challenge on appeal in any respect, in the form of testimony by two other victims who endured similar prolonged sexual assaults by defendant, and (3) the parties' stipulation to the admission of scientific evidence linking defendant's deoxyribonucleic acid (DNA) profile to his assaults of the instant victim and the other acts victims.

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<sup>1</sup> In addition, MRE 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

<sup>2</sup> The prosecutor in her closing argument briefly discussed the relevance of Sergeant Decker's testimony to this case, in pertinent part as follows:

So now comes the question of did the defendant own a gun? You may be asking yourselves why did we bring in these officers to show that the defendant, in fact, shot himself. Well, I think that, that goes to show you that, in fact, when [the victim] was assaulted back in 2006, the defendant did, in fact, own a gun and he gives a statement to that affect [sic]. . . . So we know the defendant owned a gun at the time that [the victim] was sexually assaulted.

Defendant next asserts that his six CSC I convictions for two charged acts of penetration qualify as multiple punishments for the same offense in violation of constitutional double jeopardy protections. US Const, Am V; Const 1963, art 1, § 15. The prosecutor charged defendant with six counts of CSC I on the basis of two sexual penetrations, anal and vaginal, supported by alternate theories, MCL 750.520b(1)(c) (sexual penetration occurring during the commission of a felony), MCL 750.520b(1)(d) (penetration with the help of an accomplice), and MCL 750.520b(1)(e) (penetration by actor armed with a weapon). In *People v Mackle*, 241 Mich App 583, 601; 617 NW2d 339 (2000), this Court observed that “the double jeopardy prohibition includes subjecting a defendant to multiple punishments for a single offense.” The Court in *Mackle*, *id.*, held in relevant part as follows:

In *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998), this Court concluded that separate convictions and sentences for both premeditated murder and felony murder, both of which arose from a single instance of criminal conduct, violated the rule against double jeopardy. *Id.* at 220. The Court remedied the double jeopardy problem by directing the lower court to amend the judgment of sentence to reflect a single conviction and a single sentence for a crime that was supported by two separate theories. *Id.* at 221-222. We likewise remand this case to the trial court so that it may amend the judgment of sentence specifically to reflect that two alternate theories supported each of the six counts of CSC I. Accordingly, we further direct the trial court to vacate six of defendant’s twelve sentences for CSC I.

Because the analysis in *Mackle* applies to the circumstances in this case, we remand this case to the trial court with instructions that the trial court must amend defendant’s judgment of sentence to reflect that three alternate theories supported two CSC I convictions, and that the trial court should vacate the remaining four CSC I sentences.

Defendant additionally argues that he is entitled to resentencing because the trial court mis-scored offense variable (OV) 11 (criminal sexual penetration) at 50 points. Pursuant to MCL 777.41(1)(a), a court should score 50 points when “[t]wo or more criminal sexual penetrations occurred.” However, MCL 777.41(2)(c) cautions, “Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.” Defendant insists that because he in reality had only two lawful CSC I convictions, the trial court erroneously calculated 50 points under OV 11, especially given that the trial testimony only established two penetrations.

Defendant’s OV 11 contention ignores that the victim testified at trial that defendant had penetrated her anally three times, twice with his penis and once with his finger, before he commenced his initial penile-vaginal penetration. The victim further described during cross-examination that at some point defendant returned to penetrating her anally after having engaged in penile-vaginal contact with her. The victim’s testimony amply supports the trial court’s decision to assign 50 points under the plain language of OV 11, irrespective that for double jeopardy purposes defendant’s six CSC convictions must merge into two. See *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (“Scoring decisions for which there is any evidence in support will be upheld.”) (internal quotation omitted).

We affirm defendant's kidnapping and CSC I convictions, vacate four of the six CSC I sentences, and remand for correction of defendant's judgment of sentence. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher

/s/ E. Thomas Fitzgerald

/s/ Kurtis T. Wilder